

STATE OF MICHIGAN  
COURT OF APPEALS

---

JAMES NINOWSKI, JR., Individually and as  
Trustee of the JAMES NINOWSKI, JR.,  
Revocable Living Trust, dated March 12, 1981,

Plaintiff-Appellant,

v

THOMAS W. MCCONNELL, MIKE SHATLEY,  
NINOWSKI, WOOD & MCCONNELL  
MANUFACTURERS REPRESENTATIVES,  
INC., and AUTOMOTIVE SALES GROUP, INC.,

Defendants-Appellees.

---

UNPUBLISHED  
September 27, 2005

No. 255543  
Oakland Circuit Court  
LC No. 2003-048922-CK

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Plaintiff was a shareholder of defendants Ninowski, Wood & McConnell Manufacturers Representatives, Inc. ("NW&M"), and Automotive Sales Group, Inc. ("ASG"), until defendant Thomas McConnell bought out plaintiff's shares in 1996. In 1996, ASG also merged with a new corporation, Automotive Marketing Group, Inc. ("AMG"). Plaintiff filed this action in 2003, alleging various legal theories in connection with these transactions, principally that he was not paid the full value of his ASG stock when it merged with AMG. Plaintiff later sought to amend his complaint to contest the validity of the merger between AMG and ASG. Defendants moved for summary disposition under MCR 2.116(C)(7) and (C)(10), alleging that plaintiff's claims were barred by the applicable statutes of limitation and that there was no genuine issue of material fact regarding the merits of plaintiff's claims. The trial court granted defendants' motion under both MCR 2.116(C)(7) and (10). Plaintiff appeals as of right. We affirm.

Plaintiff first argues that the trial court erred in finding that the applicable statutes of limitation barred his claims. This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is available under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. The standard for reviewing a motion under MCR 2.116(C)(7) is as follows:

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3);

*Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 706; 620 NW2d 319 (2000). See also *City of Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002) ("Absent a disputed issue of fact, this Court decides de novo, as a question of law, whether a cause of action is barred by a statute of limitations.")

Plaintiff asserts that most of his claims regarding his ASG stock are subject to a six-year statute of limitations. See MCL 600.5807(8) and MCL 600.5813. Although the undisputed evidence established that the merger between ASG and AMG was completed in 1996, and that plaintiff did not file this action until April 2003, plaintiff argues that his claims did not begin accruing until December 1997, when defendants made the final payment for the redemption of his ASG stock. We disagree.

Plaintiff's claims for fraud and breach of contract were not timely filed. MCL 600.5827 provides that

[e]xcept as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 [MCL 600.5829 to 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

The submitted evidence established that defendants agreed to purchase plaintiff's ASG stock for \$11,700. Because plaintiff's assets were subject to a levy by the Internal Revenue Service, defendants paid this amount in a series of installment payments over a ten-month period directly to the IRS on plaintiff's behalf. The first payment was made in February 1997 and the last payment was made in December 1997. We find no merit to plaintiff's argument that the statutes of limitation did not begin accruing until the last installment payment was made. The factual bases for plaintiff's claims against defendants are not predicated on that installment payment, but on defendants' conduct associated with the merger and the determination of the value of plaintiff's stock before the merger was completed. Plaintiff's claims began accruing when the merger between ASG and AMG was completed and the value of plaintiff's stock was determined in 1996, not when the last installment payment was made to the IRS on plaintiff's behalf in 1997. At the latest, plaintiff's claims began accruing in February 1997, when the first installment payment was made. Because this action was not filed until April 2003, plaintiff's claims were untimely.

Plaintiff argues that his claim for conversion of his ASG stock is also governed by a six-year statute of limitations. See *Davidson v Bugbee*, 227 Mich App 264, 269; 575 NW2d 574 (1997). But see *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917

(2001) (applying a three-year statute of limitations applicable to injuries to persons or property, MCL 600.5805, to a claim for conversion). Even if a six-year period of limitation applies, plaintiff's conversion claim began accruing when the merger was completed in 1996, or February 1997, at the latest, not when defendants made the last installment payment for the stock to the IRS in December 1997. Therefore, plaintiff's conversion claim is also time-barred.

We reject plaintiff's argument that the periods of limitation were tolled because defendants fraudulently concealed his claims related to his ASG stock. MCL 600.5855. In order for a statute of limitations to be tolled due to fraudulent concealment, "the fraud must be manifested by an affirmative act or misrepresentation." The plaintiff must show that "the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery." *Witherspoon v Guilford*, 203 Mich App 240, 248; 511 NW2d 720 (1994). Mere silence is insufficient to prove fraudulent concealment. *Sills v Oakland General Hosp*, 220 Mich App 303, 310; 559 NW2d 348 (1996). "The plaintiff must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment." *Id.*

Plaintiff did not plead acts or misrepresentation by defendants that comprised fraudulent concealment in his complaint. Furthermore, the facts do not support plaintiff's argument. Plaintiff admitted that he was informed of the price he would be paid for his ASG stock before the merger was completed. Thus, plaintiff cannot prove fraudulent concealment to extend the period of limitations.

In light of our conclusion that plaintiff's claims were barred by the applicable statutes of limitation, we need not address whether summary disposition was also warranted under MCR 2.116(C)(10) on the basis that there was no genuine issue of material fact regarding the merits of plaintiff's claims.

Plaintiff also argues that the trial court erred in denying his motion to amend his complaint to add allegations contesting the validity of the merger between ASG and AMG. A trial court's denial of a motion to amend a complaint is reviewed for an abuse of discretion. *Tierney v University of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003).

When a trial court grants summary disposition under MCR 2.116(C)(8), (C)(9), or (C)(10), it must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless it would be futile to do so or not justified. MCR 2.116(I)(5); *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001).

Plaintiff concedes that his proposed claim contesting the validity of the merger between ASG and AMG is subject to a six-year statute of limitations. Regardless of the merits of plaintiff's allegations, his claim began accruing when the merger was completed in 1996, or February 1997, at the latest. Thus, allowing plaintiff to amend his complaint to add this new claim would be futile because it, too, is barred by the statute of limitations.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Jessica R. Cooper  
/s/ Kirsten Frank Kelly